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No. 14-1458

IN THE

# Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC., AND MANAGED HEALTH NETWORK, INC.,

*Petitioners,*

v.

THOMAS ZABOROWSKI, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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## BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of Petitioners and of reversal.[1]

[1] All parties have consented to the filing of this brief. Counsel for *amicus curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

## INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements.

EEAC's member companies are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment nondiscrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using a variety of tools, including arbitration and other forms of Alternative Dispute Resolution (ADR). Many of them have adopted company-wide policies requiring the use of binding arbitration to resolve all employment-related disputes. EEAC thus has a direct and ongoing interest in the issues presented in this case regarding the application of arbitration-specific rules which effectively preclude the use of binding, pre-dispute arbitration by any employer with a business presence in California.

The court below, relying on the California Supreme Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), improperly refused to enforce Respondents' arbitration

agreement because it contained more than one purportedly unconscionable provision and thus was presumed to have been adopted as a means of depriving Petitioners of their statutory rights. Given a choice between severing the offending clauses pursuant to the agreement's severability provision and invalidating the agreement as a whole, the court below elected the latter, and in doing so acted in contravention of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, as interpreted repeatedly by this Court.

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs supporting the enforceability of arbitration agreements in numerous cases before this Court, including *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 1047 (2009); *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 559 U.S. 662 (2010); *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *CarMax Auto Superstores Cal., LLC v. Fowler*, 134 S. Ct. 1277 (2014); and *DIRECTV, Inc. v. Imburgia*, No. 14-462 (U.S. June 5, 2015) (Brief *Amicus Curiae* of the Equal Employment Advisory Council in Support of Petitioner). EEAC is thus deeply familiar with the issues presented in this case and is well-situated to brief the Court on the significant importance of the issues beyond the immediate concerns of the parties to the case.

## STATEMENT OF THE CASE

Petitioners MHN Government Services, Inc. and Managed Health Network (MHN) provide nonmedical financial and other counseling services at U.S. military installations abroad. Pet. App. 12a. Respondents were consultants whom MHN engaged to provide those services. Pet. App. 12a-13a. They each signed an independent contractor agreement that contained a binding arbitration provision, as well as a severability clause providing that "[i]n the event that any provision of this Agreement is rendered invalid or unenforceable ... the remaining provisions of this Agreement shall remain in full force and effect." Pet. App. 53a.

Respondents filed a putative class action in federal court for wage and hour violations. Pet. App. 13a. MHN moved to compel arbitration pursuant to the binding arbitration contract clause. *Id.* The trial court, applying the California Supreme Court's 2000 decision in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), found several parts of the mandatory arbitration provision to be substantively and procedurally unconscionable, so much so that it refused to apply the severability language and instead invalidated the entire provision. Pet. App. 16a-28a.

On MHN's appeal, the Ninth Circuit affirmed 2-1, relying on *Armendariz* and its progeny, *see, e.g.*, *Samaniego v. Empire Today, LLC,* 140 Cal. Rptr. 3d 492 (Cal. Ct. App. 2012), as construed in *Chavarria v. Ralph's Grocery Co.*, 733 F.3d 916 (9th Cir. 2013) – which held that the *Armendariz* arbitration-only severability rule was not "impermissibly unfavorable to arbitration." Pet. App. 2a-6a. Judge Gould dissented, arguing that the *Armendariz* rule is, in fact,

incompatible with the Supreme Court's decision in *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), and therefore is invalid. Pet. App. 7a-11a (Gould, J., dissenting). After its petition for rehearing *en banc* was denied, MHN filed a petition for a writ of certiorari, which this Court granted on October 1, 2015.

## SUMMARY OF ARGUMENT

Time and again, this Court has emphasized that a principal aim of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, is to construe private arbitration agreements in accordance with the parties' desires and expectations. "[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). To the contrary, courts are to "rigorously enforce agreements to arbitrate . . . in order to give effect to the contractual rights and expectations of the parties." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458 (2003) (citations and internal quotations omitted).

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011), this Court held that states may not enforce rules that place burdens on arbitration agreements that do not exist for other types of contracts. The decision below does just that, endorsing a rule that holds private employment arbitration agreements to a higher standard of enforceability than is generally applicable to other private contracts, in direct contravention of the FAA. This Court has held that such a state law, whether statutorily or judicially created, is incompatible with, and therefore is preempted by, the FAA. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

Disregarding the principles established by this Court in *Concepcion*, the court below instead relied on a California state rule of law, which in its application if not design disfavors employment arbitration agreements over contracts generally. *See Armendariz v. Found. Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000). In *Armendariz*, the California Supreme Court established special rules of unconscionability and severability that apply uniquely to employment arbitration agreements. As to the former, *Armendariz* effectively establishes a presumption of unconscionability where an arbitration agreement contains provisions that reflect, for instance, a lack of bargaining parity between the employer and employee.

As to the latter, *Armendariz* provides that where more than one purportedly unconscionable provision is present, severance of the offending provisions is inappropriate, because "[s]uch multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." 6 P.3d at 697. This arbitration-only severability rule increases substantially the likelihood that the agreement to arbitrate will not be enforced at all. Such a rule is incompatible with the FAA and this Court's longstanding FAA jurisprudence, including most notably *Concepcion*.

At its core, the California policy expressed in the decision below reflects the state courts' persistent hostility to employment arbitration, which runs counter to the strong federal policy favoring it as an effective and efficient means of resolving private disputes. The *Armendariz* doctrine thus creates a chilling effect on employers' efforts to establish binding arbitration programs, making it extremely

difficult to effectuate the aims and practical benefits underlying employment arbitration. The failure to enforce arbitration agreements in California means that employers and employees will be deprived of the many well-established benefits afforded by an arbitral forum, including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes," *Concepcion*, 563 U.S. at 348, and forced instead into a severely overburdened court system. The problem is especially acute for employers, which face significantly greater odds of having to defend more, and lengthier, employment claims and lawsuits in California than in most other states.

## ARGUMENT

### I. AS APPLIED BY THE COURT BELOW, CALIFORNIA'S *ARMENDARIZ* DOCTRINE – INCLUDING ITS ARBITRATION-ONLY SEVERABILITY RULE – IS INCOMPATIBLE WITH, AND THEREFORE IS PREEMPTED BY, THE FAA

This Court repeatedly has reaffirmed the strong public policy expressed in the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, favoring the arbitration of private employment disputes. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Disregarding that fundamental principle, the court below, applying the arbitration-specific enforceability doctrine established by the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), invalidated as unconscionable several provisions contained in an arbitration agreement signed by Respondents in connection with their employment with Petitioners.

Despite the existence of an express severability clause, the court refused to enforce the remaining provisions and compel individual arbitration out of a policy concern that enforcement of an agreement containing multiple defects would "license a party with superior bargaining power 'to stack the deck unconscionably in [its] favor' when drafting [its] terms ...." Pet. App. 5a.

In doing so, the court embraced the *Armendariz* doctrine, which in its application (if not design) subjects agreements to arbitrate to unique burdens inapplicable to contracts generally, in direct contravention of the FAA. Inasmuch as the decision below rests on an analysis that is squarely foreclosed by the FAA, it is erroneous and should be reversed.

### A. California's *Armendariz* Doctrine Disfavors Arbitration Agreements In Direct Contravention Of The FAA As Interpreted By This Court In *Concepcion*

#### 1. The FAA establishes a strong presumption in favor of arbitration

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The Act "declares as a matter of federal law that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (quoting 9 U.S.C. § 2). Accordingly, only generally applicable contract defenses, such as fraud, duress, or unconscionability, can be used to invalidate an arbitration agreement. The

FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (superseded by statute on other grounds) (footnote omitted).

Section 2 of the FAA is the "primary substantive provision of the Act." *Id.* at 24. This section has been described as "reflecting both a 'liberal federal policy favoring arbitration,'" *Concepcion*, 563 U.S. at 339 (citation omitted), and the "'fundamental principle that arbitration is a matter of contract.'" *Id.* (citation omitted); *see also Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). "Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343 (citations omitted).

Indeed, "'[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). Thus, "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as

to which an arbitration agreement has been signed." *Dean Witter Reynolds*, 470 U.S. at 218 (citations omitted).

### 2. The *Armendariz* unconscionability test is not a generally applicable contract defense within the meaning of the FAA

Due in large measure to the California Supreme Court's decision in *Armendariz*, and in persistent disregard of the FAA's pro-arbitration purposes and aims, "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Concepcion*, 563 U.S. at 342. In *Armendariz*, the court invalidated an arbitration agreement that would have required the plaintiffs to arbitrate their statutory discrimination claims rather than commence a civil action in a judicial forum. 6 P.3d at 674. It began by acknowledging that in *Gilmer v. Interstate/Johnson Lane Corp.*, this Court held that statutory age discrimination claims may be subject to binding arbitration, noting "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." 500 U.S. 20, 26 (1991) (citation omitted).

Consistent with that principle, the California court conceded that only generally applicable defenses, such as unconscionability, may serve as "valid reason for refusing to enforce an arbitration agreement." *Armendariz*, 6 P.3d at 689. Concerned that "ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context ... [such as] an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party," 6 P.3d at 693,

however, the court went on to craft a *special* rule of unconscionability to be applied to arbitration agreements, under which an employer must present a "reasonable justification" for imposing binding arbitration. 6 P.3d at 692. "Without such justification," the court said, the agreement is assumed to be unconscionable. 6 P.3d at 694. The court nevertheless denied that the rule would "disfavor arbitration," 6 P.3d at 693, insisting:

> It is no disparagement to arbitration to acknowledge that it has, as noted, both advantages and disadvantages. The perceived advantages of the judicial forum for plaintiffs include the availability of discovery and the fact that courts and juries are viewed as more likely to adhere to the law and less likely than arbitrators to "split the difference" between the two sides, thereby lowering damages awards for plaintiffs.

*Id.*

The court explained that unconscionability contains both a procedural and a substantive component, "the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." 6 P.3d at 690 (citation omitted). Concluding that the agreement was both procedurally and substantively unconscionable, it refused to sever the offending clauses for two reasons:

> First, the arbitration agreement contains more than one unlawful provision; it has both an unlawful damages provision and an unconscionably unilateral arbitration clause. *Such multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum*

> *that works to the employer's advantage.* Second, in the case of the agreement's lack of mutuality, such permeation is indicated by the fact that there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement.

*Armendariz*, 6 P.3d at 696 (emphasis added).

The California Supreme Court reinforced that view in *Little v. Auto Stiegler, Inc.*, suggesting that "although the *Armendariz* requirements specifically concern arbitration agreements, they do not do so out of a generalized mistrust of arbitration per se ... , but from a recognition that *some* arbitration agreements and proceedings may harbor terms, conditions and practices that undermine the vindication of unwaivable rights." 29 Cal.4th 1064, 1079 (Cal. 2003). "The *Armendariz* requirements are therefore applications of general state law contract principles regarding the unwaivability of public rights to the *unique* context of arbitration, and accordingly are not preempted by the FAA." *Id.* (emphasis added).

That contention is belied by the fact that application of the *Armendariz* doctrine results in arbitration agreements being invalidated at disproportionately higher rates than other types of contracts. Indeed, the special unconscionability test, coupled with the "multiple defects" severability rule, all but assures that most standard arbitration agreements will not survive review. As Judge Gould observed in dissenting from the decision below, "The reasoning in *Armendariz* that multiple unconscionable provisions will render an arbitration agreement's purpose unlawful has 'a disproportionate impact on arbitration agreements ....'" Pet. App. 8a (Gould, J., dissenting).

For that reason, it is contrary to, and preempted by, the FAA.

### 3. As applied, the *Armendariz* severability rule precludes far more than it facilitates employment arbitration

Severance respects the parties' desire to resolve their disputes without resort to costly, often complex, and time-consuming litigation, while at the same time ensuring that the agreement as a whole comports with basic fairness and due process protocols. Relying on the *Armendariz* doctrine, the court below invalidated an arbitration provision contained in an employment agreement on the belief that (1) Respondents were not given a "meaningful opportunity to negotiate" its terms, rendering it procedurally unconscionable, and (2) "multiple aspects" of the provision – including the arbitrator-selection, sixth-month limitations period, cost and fee shifting, and the filing fee and punitive damages waiver clauses – were substantively unconscionable. Pet. App. 3a-4a. Although the agreement contained an express severability clause, the court – relying again on *Armendariz* – declined to sever the offending provisions, rejecting Petitioners' compelling argument that such an interpretation is plainly foreclosed by this Court's holding and rationale in *Concepcion*, which make clear that state rules disfavoring arbitration are inconsistent with the FAA.

At issue in *Concepcion* was whether the special rule set out by the California Supreme Court in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), *abrogated by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), governing enforcement of consumer arbitration agreements containing class waiver provisions was consistent with the FAA. Concluding that it was not, this Court held that by "[r]equiring the

availability of classwide arbitration," 563 U.S. at 344, California's *Discover Bank* rule "creates a scheme inconsistent with the FAA," *id.*, because it "interferes with fundamental attributes of arbitration." *Id.* "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Id.*

Inasmuch as the lower court's rationale here rests on a state court ruling that effectively precludes arbitration of employment disputes where the agreement was contained in an adhesion contract (purportedly evidencing procedural unconscionability) and contains, among others, a clause reserving the employer's right to bring a specific subset of claims directly in court (purportedly evidencing "substantive" unconscionability), it suffers from the same fundamental defect that this Court addressed in *Concepcion*: it "interferes with fundamental attributes of arbitration [in the employment context] and thus creates a scheme inconsistent with the FAA." 563 U.S. at 344. In fact, *Concepcion* "should create a presumption in favor of severance when an arbitration agreement contains a relatively small number of unconscionable provisions that can be meaningfully severed and after severing the unconscionable provisions, the arbitration agreement can still be enforced." Pet. App. 8a (Gould, J., dissenting).

Like the *Discover Bank* rule invalidated in *Concepcion*, the *Armendariz* doctrine at the core of the decision below is contrary to the FAA and impermissibly conflicts with *Concepcion*. Therefore, the decision below should be reversed.

### B. *Armendariz* Reinforces The Long-Discredited Notion That Arbitration Is An Inferior Forum For The Resolution Of Private Disputes

Despite it being a legitimate and effective (if not arguably superior) means of resolving private employment disputes, California courts continue to exhibit a deep skepticism of (if not outright hostility towards) bilateral arbitration.

> Today, courts in California translate their judicial hostility into seemingly innocuous pronouncements of 'unconscionability'... Beginning with the California Supreme Court's decision in *Armendariz* ... (and perhaps before), California courts—and the Ninth Circuit—have taken the FAA's 'savings clause' where no court has gone before.

Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration* Act, 2005 J. Disp. Resol. 61, 61-62 (2005) (footnote omitted).

Indeed, *Armendariz* remains a particularly potent means of invalidating arbitration agreements in California, despite its "dubious validity from a preemption standpoint." E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 Harv. Negot. L. Rev. 1, 5 (2015) (footnote omitted). In *Martinez v. Master Protection Corp.*, for instance, the California Court of Appeal relied on *Armendariz* to find that a handful of discrete provisions contained in a standard employment arbitration agreement were

substantively and procedurally unconscionable, thereby rendering the agreement unenforceable. 12 Cal. Rptr. 3d 663, 673 (Cal. Ct. App. 2004).

There, one of the purportedly offending provisions expressly exempted certain claims from arbitration, including those by current or former employees for workers' compensation or unemployment benefits, as well as any "claims by the Company for injunctive and/or other equitable relief for unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information, as to which ... the Company may seek and obtain relief from a court of competent jurisdiction." *Id.* at 667 n.1. Applying *Armendariz's* unconscionability rule, the court found the carve-back provision – which permitted both the employer *and* the employee to bring certain claims in court – to be substantively unconscionable because it would require "employees to arbitrate the claims they are most likely to assert," *id.* at 670, against the employer – such as statutory discrimination claims – "while simultaneously permitting [the employer] to litigate in court the claims it is most likely to assert against its employees[, namely] claims involving trade secrets, misuse or disclosure of confidential information, and unfair competition." *Id.* Then, applying *Armendariz's* severability rule, the court refused to sever the offending provisions so as to allow the parties to arbitrate the claim, finding the agreement as a whole to be "permeated with illegality and unconscionability." *Id.* at 673.

More recently in *Carmona v. Lincoln Millennium Car Wash, Inc.*, 226 Cal. App. 4th 74 (Cal. Ct. App. 2014), the California Court of Appeal, citing *Armendariz*, refused to enforce an employment arbitration agreement containing a similar carve-out for

claims arising from a breach of the agreement's business records and trade secrets confidentiality clause. In doing so, the court plainly failed to appreciate the immediate and irreparable harm that could befall the employer were an employee to breach the confidentiality clause, disdainfully characterizing the nature of information sought to be protected merely to include "things as mundane as pay rates and performance evaluations." *Carmona*, 226 Cal. App. 4th at 86.

In *Sonic-Calabasas A, Inc. v. Moreno*, ("*Sonic II*"), 311 P.3d 184 (Cal. 2013), the California high court had an opportunity, but declined, to conform its anti-arbitration *Armendariz* doctrine to this Court's pronouncements in *Concepcion*. In *Sonic-Calabasas A, Inc., v. Moreno*, ("*Sonic I*"), the court refused to compel individual arbitration of the plaintiff's state wage claims, concluding that doing so would deprive the plaintiff of his right to invoke a special, statutorily-created wage dispute resolution mechanism referred to as the "'Berman' hearing." 247 P.3d 130, 133 (Cal. 2011). This Court subsequently granted the employer's petition for a writ of certiorari, vacated the judgment, and remanded the case for reconsideration in light of *Concepcion*. *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011).

On remand, the California Supreme Court held, as it must, that "the FAA preempts *Sonic I's* rule requiring arbitration of wage disputes to be preceded by a Berman hearing ...." *Sonic-Calabasas A, Inc. v. Moreno*, ("*Sonic II*"), 311 P.3d 184, 205 (Cal. 2013). It nevertheless refused to compel arbitration, concluding that further fact-finding was required regarding whether the agreement was unconscionable and thus unenforceable on that ground. *Id.* at 207.

Dissenting, Associate Justice Chin "disagree[d] with the majority that, so long as states and their courts do not interfere with fundamental attributes of arbitration, *Concepcion* allows them to invalidate arbitration agreements as unconscionable based on a policy judgment that the arbitration procedure is not adequately affordable and accessible." *Id.* at 233 (Chin, J., concurring and dissenting). To the contrary:

> [U]nder the FAA, a state court may not, based on principles of unconscionability, refuse to enforce an arbitration agreement according to its terms simply because the arbitration procedure lacks features the Legislature, as a matter of policy, established for "a particular class" – employees – to "mitigate the risks and costs of pursuing" wage claims or to make recovery of wages owed more "accessible, informal, and affordable." In enacting the FAA, Congress "intended to foreclose [such] legislative attempts to undercut the enforceability of arbitration agreements."

*Id.* at 234 (Chin, J., concurring and dissenting) (citations omitted).

Simply put, "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. Our cases hold that the FAA forecloses precisely this type of 'judicial hostility towards arbitration.'" *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*) (citations omitted). Because *Armendariz*, as reaffirmed by the court below, reflects the California courts' persistent, irrational hostility towards employment arbitration despite the FAA's clear command to enforce employment arbitration

agreements as written, it is erroneous and should be overruled by this Court.

## II. *ARMENDARIZ* CALLS INTO QUESTION THE LONG-TERM VIABILITY OF EMPLOYMENT ARBITRATION PROGRAMS

### A. In Both Its Design And Application, The *Armendariz* Doctrine Serves As A Disincentive To Implementing Employment Arbitration Programs, Which Disadvantages Employers And Employees Alike

California's *Armendariz* rule in essence establishes a special exception to the enforcement of employment arbitration agreements based on a deep-seated mistrust of arbitration as an effective means of resolving disputes. At best, it places such agreements on unsure footing in California. At worst, it maximizes the opportunity for an anti-arbitration court to invalidate such an agreement, thus leaving an employer exposed to the very type of costly, acrimonious court litigation it sought to avoid by imposing arbitration in the first place.

The challenge faced by employers is evident when one examines the language of arbitration agreements often found by California courts to be both procedurally and substantively unconscionable. As noted, the California Supreme Court in *Carmona* ruled that a carve-out contained in the arbitration agreement that would have enabled the employer to seek immediate relief upon unauthorized disclosure of its confidential trade secrets or other sensitive business information – *including* pay rate and other information relating to its compensation systems and practices – was substantively unconscionable.

Employers have a strong interest in preserving their ability to obtain immediate relief from a court whenever the confidentiality of business plans, strategies and/or trade secrets is jeopardized. Public disclosure of such information likely would place the company at a significant competitive disadvantage as it seeks to recruit new talent, secure new business, or even retain existing clients. If this Court were to endorse the *Armendariz* doctrine, employers would be faced with an untenable choice between either (1) maintaining an arbitration agreement without a confidentiality carve-out – thus increasing (but not ensuring) the probability that the agreement will pass the conscionability test but losing any meaningful opportunity to mitigate damage stemming from a confidentiality breach – or (2) including a confidentiality carve-out in the agreement, which under *Armendariz* would virtually assure its invalidation.

California courts have relied on *Armendariz* even to justify invalidating arbitration agreements that are part (typically the last step) of a multi-step internal dispute resolution program designed primarily if not exclusively to detect and correct workplace issues before significant harm to the complaining employee or others occurs. Indeed, the *Carmona* court found that language in the agreement requiring employees "to discuss with the car wash companies 'any problems or concerns with anything related to' their employment before disclosing any information to outsiders, including attorneys, courts, or arbitration organizations" lacked mutuality, and thus further contributed to the agreement's unconscionability. 226 Cal. App. 4th at 89. It explained that while such a program "may present a laudable mechanism for resolving employment disputes informally ... it connotes a less benign goal. Given the unilateral nature of the

arbitration agreement, requiring plaintiff to submit to an employer-controlled dispute resolution mechanism (i.e., one without a neutral mediator) suggests that [the] defendant would receive a 'free peek' at plaintiff's case." *Id.* The court concluded that such a "unilateral 'free peek' provision contributes to the substantive unconscionability of an agreement that already lacks mutuality." *Id.* (footnote omitted).

### B. California Businesses Already Face An Inhospitable Litigation Climate, Making The Anti-Arbitration Hostility Inherent In *Armendariz* Even More Troubling

The real risk that their arbitration agreements will be invalidated is especially unacceptable to businesses operating in California, where they already face significantly higher odds of having to defend against employment discrimination charges and lawsuits. In 2014, for instance, U.S. companies had, on average, an 11.4% chance of defending an employment discrimination claim. Hiscox, Inc., *2015 Guide to Employee Lawsuits*.[2] California employers faced a 40% higher risk than the national average, behind only three other states and the District of Columbia. *Id.*

In addition to the increased frequency of litigation activity, the speed and quality with which litigation is resolved in California leaves much to be desired. A recent study ranked California 47th out of 50 for the overall quality of its state liability systems, including factors such as judges' fairness (49th), competence

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[2] *Available at* http://www.hiscox.com/shared-documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employee-charge-trends-across-the-United-States.pdf (last visited Dec. 1, 2015).

(46th), and impartiality (45th), as well as the timeliness of summary judgment or dismissal (48th), overall treatment of tort and contract litigation (47th), and treatment of class action and mass consolidation suits (50th). U.S. Chamber Institute for Legal Reform, *2015 Lawsuit Climate Survey: Ranking the States* (Sept. 10, 2015).[3]

"[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-27. This outmoded hostility is particularly misplaced in the employment context, where arbitration offers significant advantages to both employers and employees. "[F]or parties to employment contracts ... there are real benefits to the enforcement of arbitration provisions." *Circuit City Stores, Inc. v. Adams*, 532 U.S. at 122-23. As this Court observed in *Circuit City*:

> We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow the parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.

*Id.* at 123 (citation omitted). Indeed:

> The time and cost of pursuing a claim through traditional methods of litigation present the

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[3] *Available at* http://www.instituteforlegalreform.com/uploads/sites/1/ILR15077-HarrisReport_BF2.pdf (last visited Dec. 1, 2015)

> most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 2 (2003).

Despite all the tangible benefits of employment arbitration, decisions like the one below will only make it less likely that employers will retain arbitration programs in California, imposing significant potential hardships on many workers whose *only* realistic access to justice is through arbitration. If employees with small individualized claims do not have access to simplified, low-cost arbitration and are forced into court, they could be priced out of the judicial system entirely. And it is not just employees with disputes who benefit from arbitration. The lower cost of dispute resolution reduces the costs of doing business, which manifests in lower prices for consumers and higher wages for employees. *See, e.g.*, Stephen Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001

J. Disp. Resol. 89, 91 (2001); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. Legal Stud. 1, 5-7 (Jan. 1995).

If *Armendariz* is allowed to stand, employers are all but assured that their predispute agreements to arbitrate, which often are offered as a condition of initial or continued employment, will be deemed unenforceable in California, contrary to this Court's rationale in *Concepcion*. Consequently, employees and employers would lose the well-recognized benefits of arbitration, including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Concepcion*, 563 U.S. at 348. Such an outcome would significantly undercut the strong federal policy, as embodied in the FAA and repeatedly endorsed by this Court, favoring private arbitration of employment disputes.

## CONCLUSION

For the foregoing reasons, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision below should be reversed.

Respectfully submitted,

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